

SERVICE DATE – SEPTEMBER 15, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42145

AGRIUM INC. AND AGRIUM U.S. INC. v. CANADIAN PACIFIC RAILWAY COMPANY

Digest:<sup>1</sup> The Board denies Canadian Pacific Railway Company's motion to dismiss a complaint filed by Agrium Inc. and Agrium U.S. Inc., challenging certain defense, indemnity, and liability provisions set forth in CP's Tariff and issues a procedural schedule.

Decided: September 11, 2015

On May 15, 2015, Agrium Inc. and Agrium U.S. Inc. (Agrium) filed a complaint under 49 U.S.C. §§ 10702, 10704, and 11701, challenging certain defense, indemnity, and liability provisions set forth in Item 54 of Canadian Pacific Railway Company's (CP) Tariff 8 (the Tariff). Agrium alleges that CP's implementation and enforcement of Item 54 (the disputed Tariff provision) is an unreasonable practice in violation of 49 U.S.C. § 10702(2). On June 4, 2015, CP filed its answer to the complaint.

Motion to Dismiss. On July 1, 2015, CP filed a motion to dismiss Agrium's complaint. CP argues that the claim should be dismissed because it does not present a live case or controversy and is not ripe for review by the Board. On July 21, 2015, Agrium filed a reply, objecting to CP's motion to dismiss. Agrium asserts that CP has not met the high threshold necessary for dismissing a claim.

The Board may dismiss a complaint if it "does not state reasonable grounds for investigation and action." 49 U.S.C. § 11701(b). Motions to dismiss are generally disfavored. While reviewing a motion to dismiss, the Board will view the alleged facts in a light favorable to the complainant. Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1 (STB served June 15, 2015); Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011).

CP first argues that there are no reasonable grounds to investigate Agrium's claims because CP has not applied the disputed Tariff provision to Agrium, and, therefore, there is no

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language in Decisions, EP 696 (STB served Sept. 2, 2010).

actual case or controversy for the Board to resolve.<sup>2</sup> However, in Union Pacific Railroad—Petition for Declaratory Order (UP Opening), FD 35504 (STB served December 12, 2011), the Board instituted a proceeding regarding the reasonableness of very similar tariff provisions, even though there was no indication that the tariff provisions had actually been applied in that case either. There, the petitioning railroad sought an order declaring similar tariff provisions reasonable,<sup>3</sup> but shipper associations argued that the petitioning railroad had not presented a concrete dispute, that the petition sought only an advisory opinion, and that a Board decision in that case would not resolve an actual case or controversy. Id. at 3. Even though that case involved a petition for declaratory order—a type of case in which the Board has broad discretion as to whether or not to issue an order<sup>4</sup>—the Board chose to institute a proceeding, rejecting shippers’ arguments and concluding that the railroad had raised uncertainty regarding an issue of significance to the railroad and its shippers. UP Opening, slip op. at 3-4.

The instant case involves a complaint, which the Board has less discretion to dismiss than a petition for declaratory order. The statute provides only that the Board may dismiss a complaint that fails to state reasonable grounds for investigation. 49 U.S.C. § 11701(b). Given that the Board did not dismiss in UP Opening,<sup>5</sup> the Board will not dismiss this proceeding under the narrower discretionary standard applicable to complaints. Rather, the Board finds that Agrium has alleged reasonable grounds to justify further investigation of the disputed Tariff provision. In its complaint, Agrium alleges that the Tariff unlawfully shifts defense and liability responsibilities for discharges of toxic inhalation hazards (TIH) to Agrium regardless of fault,<sup>6</sup> and that the Tariff’s limited exception for CP’s “negligence or willful misconduct” is unclear.<sup>7</sup> Moreover, Agrium alleges that “the terms of the Tariff are non-discretionary,” suggesting that the Tariff will almost certainly apply to Agrium in the event of a TIH incident.<sup>8</sup> Thus, Agrium’s allegation that it is threatened with and responsible for having to fully defend and indemnify CP

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<sup>2</sup> CP Mot. to Dismiss 10.

<sup>3</sup> The Board ultimately denied that request, holding that the railroad had not met its burden of proof. Union Pac. R.R.—Pet. for Declaratory Order, FD 35504 (STB served Apr. 30, 2013).

<sup>4</sup> See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989).

<sup>5</sup> See also Ag Processing Inc. A Cooperative—Pet. for Declaratory Order, FD 35387 (STB served May 9, 2012) (exercising broad discretion not to issue a declaratory order).

<sup>6</sup> Agrium Compl. 5.

<sup>7</sup> Id. at 6.

<sup>8</sup> Agrium Reply 16.

against liability in the event of a TIH discharge provides a reasonable basis for further Board consideration.

CP also argues that dismissal is proper because Agrium has failed to allege actual harm caused by the Tariff.<sup>9</sup> But under 49 U.S.C. § 11701(b), the Board may not dismiss a complaint made against a rail carrier for lack of direct damage to the complainant. Rather, the Board may only dismiss a complaint that does not state “reasonable grounds for investigation and action.” As noted, Agrium has alleged that it faces a threat of harm: in the event of a TIH discharge, the disputed Tariff provision will apply to Agrium and will require Agrium to defend and fully indemnify CP for liability regardless of fault, except in the case of CP’s “negligence or willful misconduct,” which Agrium contends is ill-defined. Viewing the facts as alleged by Agrium, we find that this threat provides reasonable grounds for an investigation.

CP further argues that, because Agrium has not alleged direct harm, the Board should treat Agrium’s complaint as a petition for a declaratory order.<sup>10</sup> Agency precedent, however, permits parties to file a complaint to challenge the reasonableness of a railroad’s indemnification provisions. See Union Pac. R.R.—Pet. for Declaratory Order, FD 35504, slip op. at 2 (STB served Oct. 10, 2014) (stating that the parties could file a complaint in order to disallow a railroad’s indemnification provisions as an unreasonable practice). Therefore, this proceeding is properly brought as a complaint rather than a petition for declaratory order.

*Procedural Schedule.* In its June 23, 2015 report on the parties’ conference pursuant to 49 C.F.R. § 1111.10(a), Agrium proposes a procedural schedule that would allow 90 days to complete discovery, 60 days for Agrium to file its opening statement, 60 days for CP to file its reply, and 30 days for Agrium to file its rebuttal. Agrium also requests that we incorporate into the proposed procedural schedule the expedited discovery resolution procedures set forth in 49 C.F.R. § 1114.31(a)(1)-(4) that apply in stand-alone cost and simplified standard rate cases. CP does not object to Agrium’s proposed procedural schedule, except to request that the Board refrain from adopting the procedural schedule until the Board rules on its motion to dismiss.

Given that we are now ruling on CP’s motion to dismiss, we will set forth the procedural schedule at this time. The discovery period will commence on the service date of this decision and terminate on December 14, 2015; Agrium’s opening statement will be due on February 12, 2016; CP’s reply will be due on April 12, 2016; and Agrium’s rebuttal statement will be due on May 12, 2016.

Finally, with respect to the parties’ request to apply rate case discovery resolution procedures, the Board has implemented a process to more expeditiously resolve discovery

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<sup>9</sup> CP Mot. to Dismiss 10-11.

<sup>10</sup> CP Mot. to Dismiss 11.

disputes through delegation to the Federal Energy Regulatory Commission's Administrative Law Judges (ALJ),<sup>11</sup> a process that promotes the efficient allocation of agency resources. Should a discovery dispute arise, the Board will strongly consider delegating the issue to an ALJ. The Board, therefore, will deny Agrium's request to incorporate into the procedural schedule the discovery dispute resolution procedures applicable to rate cases.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CP's motion to dismiss is denied.
2. The procedural schedule set forth above is adopted.
3. Agrium's request to adopt the discovery dispute resolution procedures in 49 C.F.R. § 1114.31(a)(1)-(4) is denied.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

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<sup>11</sup> Press Release, Surface Transportation Board, Acting Chairman Miller Announces Process to Streamline Discovery Disputes (Apr. 1, 2015), [http://www.stb.dot.gov/stb/news/news\\_releases.html](http://www.stb.dot.gov/stb/news/news_releases.html) (follow "date of issuance within the current year" then follow 04/01/2015 hyperlink).